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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 174

WILLIAM I. BASSETT, also known as WILLIAM BASSETT,
Petitioner,

vs.

MARGARET HELEN BASSETT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

STATEMENT.

Petitioner's summary statement of the case is incomplete. This necessitates a brief restatement.

Margaret, on June 22, 1935, obtained judgment and decree of separate maintenance against William in the Supreme Court of the State of New York (R. 55), under which William was required to pay certain accrued alimony of $250.00 a month, subsequently reduced to $159.00 per month.

The New York Supreme Court, in the separate maintenance action, had complete jurisdiction of the parties and the subject matter. William appeared generally in that action, filed an answer, called witnesses, and was sworn and examined on his own behalf. (R. 71, 79.)

William paid, as required, until December, 1938, when he discontinued payments. The jurisdiction of the New York Supreme Court over Margaret and William is a continuing jurisdiction, and notice in the New York action may be given in such manner as the Court shall prescribe, and judgment entered for arrears of separate support payments upon such notice to William as the Court may direct. (R. 75-76, 80.)

On February 28, 1941, Margaret brought on a motion by order to show cause, returnable March 14, 1941, for the entry of a judgment for accrued alimony. Service of said order was made on William. William appeared specially on said motion to attack the jurisdiction of the Court by an appearance in writing filed by him. The New York Supreme Court determined the question of jurisdiction adversely to William, and on April 5, 1941, entered judgment in favor of Margaret and against William in the sum of $3900.00. (R. 94-95.)

By similar procedure, without William appearing specially, a second judgment was entered by the New York Supreme Court on August 1, 1941, in the sum of $760.00, with $10.00 costs. (R. 92-93.)

Margaret instituted action in the District Court against William on the two judgments above mentioned.

It was admitted by William that the judgments sued on are not orders but are, in fact and in law, under the law of the State of New York, judgments final and absolute in form and not subject to modification or rescission. (R. 75, 87.)

No appeal has been taken from the entry of either judgment by William, and William has never made application in the New York Supreme Court for any modification of the judgment and decree for separate maintenance. (R. 77.)

SUMMARY OF THE ARGUMENT.

Exactly the same issues presented in the instant case have on three different occasions been determined adversely to petitioner's contention by this Court.

Barber v. Barber, 21 How. 582, 16 L. Ed. 226;
Sistare v. Sistare, 218 U. S. 1, 54 L. Ed. 905;
Durlacher v. Durlacher, 123 Fed. (2d) 70, certiorari denied 315 U. S. 805.

Barber v. Barber, supra, decided in 1859, has remained unquestioned law in this Honorable Court, being approved fifty years later in *Sistare v. Sistare,* supra, and again sanctioned by this Court in the denial of a writ of certiorari in *Durlacher v. Durlacher,* supra.

It would seem unlikely that this Court would care to reconsider legal principles so recently approved and which have remained unquestioned for eighty-five years.

The judgments of the New York Supreme Court must be given full faith and credit in all courts.

In a suit upon a judgment, the validity of the claim which gave rise to the judgment is not open to inquiry. It can be resisted only on the ground that the Court which rendered it was without jurisdiction.

Jurisdiction, and that the judgments are in fact and in law, under the law of the State of New York judgments final and absolute in form and not subject to modification or rescission, have both been admitted by petitioner.

The only defenses to the action brought by Margaret on two judgments of the New York Supreme Court, Nassau County are those that would be good to a suit on the judgments in the State of New York.

This has been decided so frequently and so recently by this Honorable Court that the principle, it would seem, cannot be questioned.

The New York judgments upon which Margaret brought suit in the District Court are conclusive against William not only by his admission to that effect but by virtue of the law of the State of New York.

It has already been stated that William has admitted that the judgments sued on were in fact and law, under the law of the State of New York, judgments final and absolute and not subject to modification or rescission.

It is the unquestioned law of the State of New York that the judgments are conclusive against William there.

William having challenged the jurisdiction of the New York Supreme Court to enter the judgment of April 5, 1941, in the sum of $3900.00, and that question of jurisdiction having been decided adversely to him, the subject was res judicata in the action in the District Court and establishes in addition the law of the case in New York as to the jurisdiction of the New York Court to enter the second judgment.

It is of course fundamental that where a jurisdictional fact is litigated by a defendant the question of jurisdiction becomes *res judicata,* and cannot be relitigated, even if in the foreign action it was put in issue by a special appearance to deny jurisdiction and was litigated upon that.

The Nevada default decree of divorce without the appearance of the defendant does not affect the previous decree and judgments of the New York Supreme Court upon which Margaret brought suit, and any action by William in New York to terminate the running of Margaret's separate maintenance decree could operate prospectively only and could not affect instalments of alimony which had accrued, those instalments under the law of the State of New York being vested property interests in Margaret.

Under the law of New York, past due instalments of alimony become vested property interests, of which Margaret could not be deprived by a suit instituted in Nevada in which she made no appearance and was served by substituted process in New York.

The law in New York is that an application must be made to terminate the running of a separate maintenance decree if based on the subsequent dissolu-

tion of the marriage, and that if the application is granted it operates prospectively only as of the actual date of the order. Such also is the law as enunciated in this Honorable Court during the last eighty-five years.

ARGUMENT OF THE CASE AND THE LAW.

EXACTLY THE SAME ISSUES PRESENTED IN THE INSTANT CASE HAVE ON THREE DIFFERENT OCCASIONS BEEN DETERMINED ADVERSELY TO PETITIONER'S CONTENTION.

In disposing of contentions similar to those made by the petitioner in the instant case, this Honorable Court, in the case of *Barber v. Barber,* 21 How. 582, 16 L. Ed. 226, said:

> "It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there (Wisconsin) or elsewhere to dissolve the vinculum of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the state of New York, upon that decree being carried into judgment in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him."

In that case the defendant husband had set up a Wisconsin decree of divorce he had obtained as a resident of that state as a defense to an action on

New York judgments for past due support instalments, just as the defendant William did in the instant case in the District Court.

Fifty years later this Honorable Court, in the case of *Sistare v. Sistare,* 218 U. S. 1, 54 L. Ed. 905, in an action brought by the wife in a Connecticut State Court to collect over-due instalments of alimony accrued under a New York separation decree, where the defendant husband pleaded as a defense a decree of absolute divorce obtained outside of the State of New York, after reviewing the decision of this Honorable Court in the case of *Barber v. Barber,* supra, at great length, and affirming the same, held that the defense of the husband was without merit and that the wife was entitled to have judgment in the State Court of Connecticut for the overdue instalments of alimony accrued under the New York separation decree.

The United States Circuit Court of Appeals for the Ninth Circuit, following the directives given in the two above cases, in *Durlacher v. Durlacher,* 123 Fed. (2d) 70, in which the husband presented exactly the same defense as was presented by William in the instant case, entered judgment for the wife on past due alimony payments under a New York decree of separation, despite the husband's default divorce decree in Nevada. Application for a writ of certiorari was denied by this Honorable Court, 315 U. S. 805.

THE JUDGMENTS OF THE NEW YORK SUPREME COURT MUST BE GIVEN FULL FAITH AND CREDIT IN ALL COURTS.

Constitution of the United States, Article IV, Section 1.

In the case of *Milwaukee County v. M. E. White,* 296 U. S. 268, 56 Sup. Ct. 229, 80 L. Ed. 220, Mr. Justice Stone, speaking for this Honorable Court, at page 227 L. Ed., says:

> "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the Court which rendered it was without jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 25 L. Ed. 565; D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Tilt v. Kelsey, 207 U. S. 43, 52 L. Ed. 95; . . ."

Further, at page 228 L. Ed.:

> "In numerous cases this Court has held that credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded; that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it."

In the case of *Roche v. McDonald,* 275 U. S. 449, 72 L. Ed. 365, it was said by this Honorable Court, at page 368 L. Ed.:

> "It is settled by repeated decisions of this Court that the full faith and credit clause of the constitution requires that the judgment of a state court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state. (Citing many cases.) This rule is applicable where a judgment in one state is based upon a cause of action which arose in the state where it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, must be enforced in such other state, although repugnant to its statutes." (Citing cases.)

To the same effect:

Fauntleroy v. Lum, 210 U. S. 230, 52 L. Ed. 1039;

Riley v. New York Trust Co., 315 U. S. 343, 62 Sup. Ct. Rep. 608;

Mills v. Duryee, 7 Cranch 481, 3 L. Ed. 411;

Hieston v. National City Bank of Chicago, 280 Fed. 525;

Durlacher v. Durlacher, 123 Fed. (2d) 70.

This Court has very recently, in the case of *Magnolia Petroleum Company v. Hunt,* decided last December 20th, fully considered this subject, with par-

ticular reference to money judgments such as were sued on in the District Court in the instant case. The Court points out that "from the beginning this Court has held that these provisions (Constitution and the Enabling Act) have made that which has been adjucated in one state *res judicata* to the same extent in every other", and that while there may be exceptional cases in which the judgment of one state may not override the laws and policies of another, this Honorable Court was "aware of no such exception in the case of a money judgment rendered in a civil suit". The Court further pointed out that it was not "aware of any considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition".

THE ONLY DEFENSES TO THE ACTION BROUGHT BY MARGARET ON TWO JUDGMENTS OF THE NEW YORK SUPREME COURT, NASSAU COUNTY, ARE THOSE THAT WOULD BE GOOD TO A SUIT ON THE JUDGMENTS IN THE STATE OF NEW YORK.

Chief Justice Marshall, commenting upon and affirming the rule previously announced in *Mills v. Duryee,* 7 Cranch 481, 3 L. Ed. 411, interpreting and construing the full faith and credit clause of the United States Constitution (Article IV, Sect. 1) and the statute enacted in pursuance thereof (R. S., Sec. 905; Comp. St. Sec. 1519), said:

"The doctrine there held was that the judgment of a state court should have the same credit, validity, and effect, in every other state in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States."

Hampton v. McConnell, 3 Wheat. 234, 4. L. Ed. 378.

Such has been the rule from the time of Marshall to the present time. The same rule was enunciated with great clarity by this Honorable Court in the case of *Riley v. New York Trust Co.,* 315 U. S. 343, 62 Sup. Ct. Rep. 608.

To the same effect:

Christmas v. Russell, 5 Wall. 290, 302, 18 L. Ed. 475;

Fauntleroy v. Lum, 210 U. S. 230, 236, 28 Sup. Ct. 641, 643, 52 L. Ed. 1039;

Roche v. McDonald, 275 U. S. 449, 451, 48 Sup. Ct. 142, 72 L. Ed. 365, 53 A. L. R. 1141;

Davis v. Davis, 305 U. S. 32, 43, 83 L. Ed. 26;

Kloeb v. Armour & Co., 311 U. S. 199, 205, 85 L. Ed. 124.

THE NEW YORK JUDGMENTS UPON WHICH MARGARET BROUGHT SUIT IN THE DISTRICT COURT ARE CONCLUSIVE AGAINST WILLIAM NOT ONLY BY HIS ADMISSION TO THAT EFFECT BUT BY VIRTUE OF THE LAW OF THE STATE OF NEW YORK.

In the instant case William has admitted, in answer to requests for admissions under Rule 36, and that admission is in evidence (R. 77 and 87), the following:

> "That the judgments sued on by the plaintiff, as set forth in plaintiff's complaint, reference to which is hereby made, are not orders but are, in fact and in law, under the law of the State of New York, judgments, final and absolute in form and not subject to modification or rescission."

William has in the same manner further admitted, and the admission is in evidence (R. 77 and 81), the following:

> "That the defendant, William I. Bassett, in the instant case, has never applied to the Supreme Court, Nassau County, New York, for a modification, amendment or other change in the judgments entered against him in said Court, as set out in the preceding paragraphs. (These paragraphs setting out the judgments sued on.)"

Under the rule discussed in the previous point 3, it seems to have been the law in this Honorable Court from *Mills v. Duryee,* supra, down to the present time, that if a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere.

Both by his admission and by the law as enunciated in the Courts of New York, the judgments sued on in the instant case are conclusive against William in the State of New York.

In one of the most recent cases, which has remained since its pronouncement the law of the State of New York, to-wit, *Harris v. Harris,* 197 App. Div. 646, the wife obtained a decree *a mensa et thoro* on December 12, 1918. It allowed her $30.00 a week for alimony and $10.00 a month for her infant daughter. (p. 647.) The wife violated the terms of the decree in reference to custody of child, went to Nevada, and there obtained a divorce *a vinculo* on November 30, 1920. Thereupon the defendant ceased to to pay alimony. The wife, in New York, after having obtained the Nevada decree, moved to punish the defendant for contempt for failure to pay the sum of $1082.00, "which had accrued during plaintiff's absence from the state". The wife had taken the child to Nevada with her, contrary to the requirements of the New York decree that she should not be taken outside of New York City without the consent of the Court. The husband moved to modify the New York decree so as to relieve him from paying support to his wife, on the ground that the absolute divorce in Nevada terminated the marital status.

The Court in that case refused to hold the husband liable for payment during the time the wife was in contempt of the New York Court, but entered an order which directed the husband to pay to the wife nine weeks' alimony, which represented the time be-

tween her return to New York and the date of the modification of the decree. The Court held that the modification operated prospectively only and not retrospectively.

The *Harris* case was followed by the case of *Dube v. Dube,* 230 App. Div. 484. In that case the wife, after obtaining a decree *a mensa* and an allowance of $12.00 per week as support money, for the support both of herself and child, returned to her former home in Ohio, obtained there a divorce *a vinculo,* and then remarried. The New York decree was served on the defendant on November 9, 1929. The wife made a motion to punish the husband for not paying the support money which accrued from that date. He opposed the motion. The Court gave him an opportunity to move to modify the decree by reason of the Ohio judgment. He did not do it, but stood on the record as made. The Court pointed out that if the facts alleged by him were correct, his remedy was to seek a modification, as in the case of *Harris v. Harris,* supra, and punished him for contempt for failure to pay the separate support payments under the New York judgment.

In the *Harris* case, supra, it is further interesting to note that the Court said:

> "The court is not bound to modify a decree either by increasing or decreasing the amount of alimony to take effect as of the date of the application, but it has the power so to do in its discretion. Such cases as Brice v. Brice, 225 App. Div. 453; Krauss v. Krauss, 127 App. Div.

740; Parkinson v. Parkinson, 222 App. Div. 838, limiting the power of the court to reduce alimony, have reference to the amounts which have become due and owing prior to the time of application to the court for a reduction. These past due sums have become vested rights of property in the plaintiff which the Supreme Court has no power to take from her."

In the case of *Brice v. Brice,* 225 App. Div. 453, the Court below had modified the judgment by reducing the amount of alimony *nunc pro tunc,* crediting the amount of reduction against the sum that had already accrued under the judgment. The order was reversed. The Court in that case said:

"Per Curiam. In an action for separation this plaintiff was awarded the sum of fifteen dollars per week for the support, education and maintenance of the children of the parties to this action. Defendant paid this amount for a time, but finally defaulted. A motion was subsequently made to punish him for contempt of court. Upon such motion the court amended the original order, *nunc pro tunc,* by reducing the amount allowed the plaintiff, and credited on the then accrued and unpaid alimony, due under the original allowance, the overpayment, figured upon the basis of said reduction, from June 15, 1926, down to the time that the defendant stopped paying.

This credit more than wiped out the amount due under the terms of the original decree. The court, therefore, denied plaintiff's motion to punish defendant for contempt of court, upon the theory that as there was no default there could be no contempt.

> The court was without power to reduce the amount of alimony awarded the plaintiff for any period prior to the date of the granting of the order, and off-setting against the amount due under the original decree the overpayments based upon said reduction. (Barrett v. Barrett, 221 App. Div. 710.)
>
> The order should be reversed, with ten dollars costs and disbursements, and motion remitted to the special term to be disposed of as the facts may warrant.
>
> All concur."

In the case of *Krauss v. Krauss,* 127 App. Div. 740, the order appealed from modified a decree of divorce. In that case the Court said:

> "The remaining question is whether it was competent for the court to enter the order annulling the provision with respect to alimony, nunc pro tunc, as of the date of the remarriage of the plaintiff. It will be observed that under the decree alimony at the rate of fifty dollars per month accrued to the plaintiff. As the first day of each month came the plaintiff was entitled to that award of alimony. It became presently due and payable. We are of opinion that she had a vested right thereto of which she could not be deprived by any subsequent action of the courts or of the Legislature."

William admits that he has made no application for modification of the New York decree.

Both by William's admission and by the law of the State of New York it is apparent that the judgments

upon which Margaret brought suit in the District Court are conclusive in the State of New York, where they were pronounced against William.

It would seem to follow necessarily that under the decisions of this Honorable Court previously referred to under the preceding subject-head, those judgments are "Equally conclusive everywhere" and should have been recognized by the District Court, as decided by the Circuit Court of Appeals.

WILLIAM HAVING CHALLENGED THE JURISDICTION OF THE NEW YORK SUPREME COURT TO ENTER THE JUDGMENT OF APRIL 5, 1941, IN THE SUM OF $3900.00, AND THAT QUESTION OF JURISDICTION HAVING BEEN DECIDED ADVERSELY TO HIM, THE SUBJECT WAS RES JUDICATA IN THE ACTION IN THE DISTRICT COURT AND ESTABLISHES IN ADDITION THE LAW OF THE CASE IN NEW YORK AS TO THE JURISDICTION OF THE NEW YORK COURT TO ENTER THE SECOND JUDGMENT.

William having made a special appearance in the New York separate maintenance action to attack the jurisdiction of the New York Court with reference to the entry of the first judgment sued on, dated April 5, 1941, in the sum of $3900.00, and having taken no appeal in the New York Courts or to this Honorable Court, the matter of jurisdiction of the New York Court to enter the judgment became *res judicata* and could not be relitigated in the District Court.

It would seem further that the decision of the New York Court, adverse to William on his special appearance to challenge the jurisdiction of the New

York Court to enter this first judgment, became the law of the case, and exactly the same issues being involved with reference to the entry of the second judgment of August 1, 1941, in the sum of $760.65, likewise *res judicata* of the right of the New York Court to enter the second judgment, so that that subject could not again be litigated in the District Court.

In *Beale, Conflict of Laws,* Vol. 2, Sec. 450.9, page 1424, it is said:

> ". . . if the jurisdictional fact was litigated by the Defendant, the question of jurisdiction becomes res judicata, and cannot be litigated, even if in the foreign action it was put in issue by a special appearance to deny jurisdiction, and was litigated upon that."

The author cites the following cases:

Sipe v. Copewell, 59 Fed. 970;
John Simmons Co. v. Sloan, 104 N. J. 612;
Hall v. Wilder Mfg. Co., 316 Mo. 812;
Tatum v. Maloney, 226 N. Y. App. Div. 62, 234 N. Y. Supp. 614;
Blakeslee v. Blakeslee, 213 Ill. App. 168.

THE NEVADA DEFAULT DECREE OF DIVORCE WITHOUT THE APPEARANCE OF THE DEFENDANT DOES NOT AFFECT THE PREVIOUS DECREE AND JUDGMENTS OF THE NEW YORK SUPREME COURT UPON WHICH MARGARET BROUGHT SUIT, AND ANY ACTION BY WILLIAM IN NEW YORK TO TERMINATE THE RUNNING OF MARGARET'S SEPARATE MAINTENANCE DECREE COULD OPERATE PROSPECTIVELY ONLY AND COULD NOT AFFECT INSTALMENTS OF ALIMONY WHICH HAD ACCRUED, THOSE INSTALMENTS UNDER THE LAW OF THE STATE OF NEW YORK BEING VESTED PROPERTY INTERESTS IN MARGARET.

Such has been the law in this Honorable Court since 1859, when, in a case directly in point and decisive of the issues here presented, this Honorable Court, in the case of *Barber v. Barber,* 21 How. 582, 16 L. Ed. 226, erected the first milestone of the law in such cases.

Just as in the instant case, in the *Barber* case the parties were married in the State of New York, and lived there as husband and wife until a decree of separation and alimony was entered in favor of the wife. After the separation decree, the husband left New York and went to Wisconsin, where he became a resident of that state. His citizenship and *bona fide* domicile was claimed to be, and established to be, in the State of Wisconsin. The wife thereafter sued the husband in the District Court of Wisconsin for unpaid alimony instalments accrued under the New York separation decree.

The defendant husband set up a Wisconsin decree of divorce that he had obtained after becoming a resident of that state, as a defense to the New York judgments for past due support instalments, just as

the defendant William did in the instant case in the District Court.

In disposing of such a defense, this Honorable Court, at page 228 of 16 L. Ed., said:

> "It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there (Wisconsin) or elsewhere to dissolve the vinculum of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the state of New York, upon that decree being carried into judgment in a court of another state of this Union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him."

Fifty years later this Honorable Court, in the case of *Sistare v. Sistare,* 218 U.S. 1, 54 L. Ed. 905, in an action by the wife brought in the Connecticut State Courts to collect overdue instalments of alimony accrued under a New York separation decree, where the defendant husband pleaded as a defense a decree of absolute divorce obtained outside of the State of New York, after reviewing the decision of this Honorable Court in the case of *Barber v. Barber,* supra, at great length, and affirming the same, held that the defense of the husband was without merit and that the wife was entitled to have judgment in the State Court of Connecticut for the overdue instalments of alimony accrued under the New York separation decree.

In the *Sistare* case this Honorable Court held:

> "That the decrees of the New York Courts for future payment of alimony are not subject to annulment or modification by those courts as to overdue and unsatisfied installments, so as to deprive such decrees of the protection as to past due and unpaid installments, of the full faith and credit clause of the Federal Constitution.
>
> That a judgment enforced in the state where rendered must be given effect in another state under the full faith and credit clause of the Federal Constitution, although the modes of procedure to enforce its collection may not be the same in both states."

The State Courts have uniformly followed the rule laid down by this Honorable Court, one of the leading cases in the State Courts being the case of *Simonton v. Simonton,* 40 Idaho 751, 236 Pac. 863, 42 A. L. R. 1463.

In the *Simonton* case, Givens, J., at page 866 Pac. Rep., says:

> "The precise question involved herein is as follows: Where a wife has secured, on personal service, a judgment for separate maintenance in the courts of one state, and later the husband goes into a different state, and on substituted service secures a divorce, and later the husband dies and the wife sues his estate for the unpaid delinquent instalments provided for in the separate maintenance decree, where no modification was had by the husband during his lifetime of the separate maintenance decree, and the divorce action made no provision for the support of the wife, is the

divorce decree an absolute bar to the enforcement of the separate maintenance installments against the deceased husband's estate, on the ground that the dissolution of the marital relation, as the necessary basis and support of separate maintenance, having been effected by the divorce, without court modification, ipso facto ended or rendered unenforceable the separate maintenance decree?"

Further:

"It is conceded that the Idaho court, at the time it gave the decree of separate maintenance, had jurisdiction of the parties and the subject-matter, consequently the present claim of the administratrix, that the Idaho decree is without force because of the Washington decree, is a collateral attack and subject to the same rule as applied in the instant case to the attack of Anna Stacia Simonton upon the Washington decree of divorce. (The rule applied being that it was an improper defense and of no vitality.)"

The Court then proceeds to hold that the Idaho decree for separate maintenance will continue in full force and effect until directly modified, Mr. Justice Givens, at page 868 Pac., continuing to the following effect:

"To hold otherwise would in effect be allowing Rolvin D. Simonton to have indirectly through the Washington decree, had the Idaho decree modified in a manner and under service which would not have been sufficient to enable him to have directly had the Idaho decree modified."

The *Simonton* case, supra, has been cited with approval in:

Wagster v. Wagster (Ark. 1937), 103 S.W. (2d) 639;

Walker v. Manson (Idaho 1930), 289 Pac. 86;

Bennett v. Tomlinson (Iowa 1928), 206 Iowa 1075, 221 N.W. 837.

Another interesting opinion of the State Courts is found in *Biewend v. Biewend,* 17 A. C. 117, 2 Cal. Dec. 13, 109 Pac. (2d) 701. At page 703 Pac. (2d), Mr. Justice Traynor in that case said:

"An order for the payment of money as alimony rendered by a court of competent jurisdiction in one state must be recognized by all other states under the full faith and credit clause of the United States Constitution as to all accrued installments not subject to modification by the court rendering the original order. (Long list of authorities cited.)

Only if such accrued payments are still subject to modification may recovery be denied. (Citing cases.)

Under the law of Missouri courts of that state will make no modification of the right to accrued installments. The wife thus has a vested right to them enforceable in other states on the basis of full faith and credit. . . . Neither the subsequent marriage of the divorced wife to another nor her subsequent resumption of marital relations with the defendant nor the coming of age of the children automatically releases the defendant from his obligation to pay alimony. They merely afford grounds for the court in its dis-

> cretion to modify or vacate the order as to future installments upon proper application. . . .
>
> It is well settled that once a valid judgment has been rendered it must be accorded full faith and credit by every other court within the United States even though the cause of action upon which the judgment was based is against the law and public policy of the state in which enforcement is sought. (Citing cases.) . . ."

A further illuminating decision in the State Courts is that of *Bennett v. Tomlinson,* in the Iowa Supreme Court in 1928, 221 N.W. 837. The facts were that a claim was filed against the decedent's estate on a foreign judgment against decedent for separate maintenance. The District Court allowed the claim. The executor appealed. The judgment was affirmed.

The decedent and the claimant were married in Illinois, where they were living and had their matrimonial domicile. In 1897 claimant wife was granted a decree of separate maintenance, with alimony. Immediately thereafter the decedent left Illinois and went to Iowa, where he secured a decree of divorce from his wife on the ground of desertion. The wife was constructively served and did not appear in the action. The decedent husband remarried. The claimant wife never remarried and never moved from Illinois. The claim was based upon separate maintenance payments which had accrued after the decedent had secured his divorce in Iowa. The Supreme Court of Iowa, in that case, said:

"The Illinois court has never been asked to recognize the Iowa divorce either by application to it for modification or otherwise. The Illinois decree became a final judgment for the recovery of each installment as the installments fell due, and claimant's right therein was fixed in each of them as it matured. The power of modification ceased as to any installment falling due before application for modification was made. Sistare v. Sistare, 218 U.S. 1, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N.S.) 1068, 20 Ann. Cas. 1061; Barber v. Barber, 21 How. 582, 16 L. Ed. 226; Wagner v. Wagner, 26 R. I. 27, 57 A. 1058, 65 L. R. A. 816, 3 Ann. Cas. 578. The full faith and credit clause attached to such installments as they, without previous application for modification, matured. Id. This court has repeatedly applied the doctrine of finality to such installments in alimony cases. (Citing cases.) We are of the opinion that under the facts of the case this rule must be applied here."

In a case directly in point and entirely decisive of the issues here presented, the United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Durlacher v. Durlacher,* 123 Fed. (2d) 70, said:

"Simon does not rely on the district court's finding but concedes here that the maintenance suit was commenced within the jurisdiction of the New York court and that at the time that judgment here sued on was rendered that court had jurisdiction in personam over him. Simon's sole contention in support of the district court's action in disallowing the third New York judgment in its judgment is that the New York court lost

jurisdiction of the subject matter of the maintenance proceeding because the matrimonial relationship between him and Helen had been dissolved prior to the rendition of the latter New York judgment.

Since the New York supreme court had acquired and retained jurisdiction in personam over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal, that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance during the separation had terminated."

It is of course apparent that in the instant case William enjoyed the same right but he has never exercised it. It is admitted that he has never made any motion, according to the regular procedure of the New York courts, for a modification of the order requiring him to pay separate support to Margaret.

If William now employs the remedy which has been open to him at all times since the entry of his Nevada decree of divorce, the New York Courts would not disturb either of the judgments sued on by Margaret in the District Court, or even alimony payments which have since accrued. Any order made by that Court would operate prospectively only from the date of the order.

In the case of *Durlacher v. Durlacher,* supra, Durlacher made exactly the same argument as that which is made by William in the instant case. The Circuit Court answered that argument in the following manner:

"Simon contends, however, that such faith and credit should not be given it (the New York judgment sued on) since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada law is claimed to be that, upon the dissolution of the marital tie, the court in which the prior maintenance proceeding was pending lost jurisdiction to render a judgment for maintenance sums. Cf. Herrick v. Herrick, 55 Nev. 59, 25 P. 2d 378. That is to say, the Nevada federal court could refuse to recognize the New York judgment because repugnant to Nevada law.

The Supreme Court has repeatedly held that under the full faith and credit clause of the Constitution (extended by the statute to the court below) a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the state requested to enforce it. (Citing many cases.)"

That expression of opinion by the Circuit Court of Appeals is of course in line with the unquestioned law as enunciated by this Honorable Court since the time of the *Barber* decision, approved fifty years later by this Honorable Court in the *Sistare* case, in which this Honorable Court, referring to the *Barber* case, and with approval, said:

"And it is, we think, clear from the context of the opinion, that the court held that the decree in favor of Mrs. Barber operated to cause an indebtedness to arise in her favor as each instal-

ment of alimony fell due, and that a power to modify, if exerted, could only operate prospectively."

This Honorable Court undoubtedly thoroughly considered the *Durlacher* case, which is directly in point and decisive of the issues here presented, when this Honorable Court denied certiorari in the *Durlacher* case, 315 U. S. 805.

It certainly cannot be questioned that the Nevada divorce decree which attempted in its terms to bring to an end the New York judgment was impotent to effect such a result when it is remembered that past due instalment payments in New York become vested property interests; that Margaret did not appear in the Nevada action; and that Margaret was served by substituted process in the State of New York.

Pennoyer v. Neff, 95 U.S. 714, 25 L. Ed. 565.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari in this case should be denied. The petition presents no question of merit to be adjudicated by this Honorable Court, involves principles of law which have been heretofore decided by this Honorable Court adversely to petitioner's contention, not only in cases directly in point and decisive of the issues here presented, but in other cases where the principles of law enunciated by this Honorable Court are controlling from other

viewpoints, and such decisions are squarely adverse to the contentions of the petitioner.

Wherefore, respondent prays that the petition for a writ of certiorari be denied.

Dated, Reno, Nevada,
July 3, 1944.

Respectfully submitted,
CLYDE D. SOUTER,
Attorney for Respondent.